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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 228

SCRIPPS-HOWARD RADIO, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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INDEX.

Page

Petition for a Writ of Certiorari 1

A. Opinions Below 2

B. Jurisdiction 2

C. Questions Presented 2

D. Statutes Involved 3

E. Summary Statement of Matters Raising the Questions Presented 3

1. Proceedings Before the Commission 3

(a) The material points of difference between the proposal of Petitioner and CBI 4

(b) The Decision of the Commission..... 8

2. The Decision of the Court of Appeals for the District of Columbia Circuit 10

F. Specification of Errors to be Urged 11

G. The Reasons Relied upon for Allowance of the Writ 13

1. Whether the Federal Communications Commission has Authority or Discretion to Disqualify, Fully or Pro Tanto, an Applicant for a Construction Permit or a License Because of Newspaper Affiliation 13

(a) Importance of the Question 16

(b) Conflicting Decisions in the United States Court of Appeals for the District of Columbia Circuit 17

2. Important Questions of Substance and Procedure under the Communications Act and Under the Administrative Procedure Act..... 19

Page

3. Important Questions as to Respective Spheres of Administrative Agencies and the Courts under the Communications Act of 1934 and the Administrative Procedure Act 21

H. Conclusion 22

Appendix 23

Communications Act of 1934 (47 U. S. C. § 151 et seq.) 23

Administrative Procedure Act (5 U.S.C. § 1001 et seq.) 24

TABLE OF CITATIONS.

COURT CASES:

Ashbacker Radio Corporation v. F. C. C., 326 U.S. 327 (1945) 15

FCC v. Columbia Broadcasting System, 311 U.S. 132 (1940) 22

FCC v. NBC, 319 U.S. 239 (1943) 20

FCC v. Nelson Bros. Bond and Mtg. Co., 289 U.S. 266 (1933) 22

FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) 22

FCC v. Sanders Brothers, 309 U.S. 470 (1940) 20

Johnston Broadcasting Company v. F.C.C., 175 F. (2d) 351, 357 (1949) 21

Plains Radio Broadcasting Co. v. F.C.C., 85 U. S. App. D.C. 48, 52, 175 F. (2d) 359, 363 (1949) 17

Stahlman v. F.C.C., 75 U.S. App. D.C. 176, 178, 126 F. (2d) 124 (1942) 17

Tri-State Broadcasting Co. v. F.C.C., 68 App. D.C. 292, 294, 96 F. (2d) 564 (1938) 17

DECISIONS OF FEDERAL COMMUNICATIONS COMMISSION:

Re Arkansas-Oklahoma Broadcasting Co., 3 R.R. 479 (1946) 15

Re Central Broadcasting Co., 3 R.R. 1151 (1947) . . . 15

Re Cobb, 3 R.R. 540 (1946) 15

Re Commonwealth Broadcasting Corp., 3 R.R. 998 (1947) 15

Page

Re Green Bay Broadcasting Co., 3 R.R. 748 (1947) 15
Re Hearst Radio, Inc., et al., 6 Pike and Fischer Radio Regulation 994, 1027, 1030 (1951).....14, 16
Re Meadville Tribune Broadcasting Co., 3 R.R. 544 (1946) 15
Re Nashville Radio Corp., 3 R.R. 515 (1946)..... 15
Re Noe, 3 R.R. 1821 (1948) 15
Re Sandusky Broadcasting Co., 3 R.R. 1265 (1947) 15
Re Sebring, 3 R.R. 710 (1947) 15
Re Southern Tier Radio Service, 3 R.R. 211 (1946) 15
Re The Observer Radio Co., 3 R.R. 234 (1946)..... 15
Re The Voice of Augusta, 3 R.R. 436 (1946)..... 15
Re WBNX Broadcasting Co., Inc., 4 R.R. 205 (1948) 15

ADMINISTRATIVE PROCEDURE ACT:

Section
7 (c) 3, 13, 20, 24
8 (b) 12, 25
10 (e) 3, 13, 20, 21, 22, 25

COMMUNICATIONS ACT OF 1934:

Section
307 (a) 23
307 (d) 16
308 (b) 23
309 (a) 12, 23
319 (a) 12, 23
402 (e) 13, 21, 24

MISCELLANEOUS:

Broadcasting Yearbook (1951) 16
Hearings on S. 1973, 81st Cong. 1st Sess. (1949) pp. 20, 42-44 19
Opinion of F. C. C. General Counsel (1937)..... 18
Public Notice, 9 Fed. Reg. 702 (1944)..... 15
S. 1333, 80th Cong. 1st Sess. (1947), Sec. 418..... 19
S. Report No. 1567, 80th Cong. 2d Sess. (1948), Sec. 332 19
S. Report No. 741, 81st Cong. 1st Sess. (1949)..... 19
Sen. Doc. 248, 79th Congress, 2d Sess. (1946).....20, 21
Television Digest (1951) 16
28 U. S. C. 1254 (1) 2
47 U. S. C. 402 (e) 2

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No.

SCRIPPS-HOWARD RADIO, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice
and the Associate Justices of the
Supreme Court of the United States:

Your Petitioner, Scripps-Howard Radio, Inc., respectfully shows:

This is a petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit affirming a final decision of the Federal Communications Commission by which the Commission granted the application of Cleveland Broadcasting Incorporated (hereinafter designated as CBI) and denied that of Petitioner pursuant to a consolidated hear-

ing upon their mutually exclusive applications for a permit to construct a standard broadcasting station at Cleveland, Ohio. (R. 336, 387.)*

A. OPINIONS BELOW.

The decision of the Federal Communications Commission (R. 336-87) is not reported. The decision of the Court of Appeals for the District of Columbia Circuit (R. 404-409) is unreported.

B. JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 10, 1951. (R. 410.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U. S. C. 402(e).

C. QUESTIONS PRESENTED.

1. Whether the Federal Communications Commission has statutory authority or discretion to discriminate against an applicant because it is owned or controlled by the same interests which own or control a newspaper?

2. Whether the Federal Communications Commission has statutory authority or discretion to prefer an applicant on the ground of the greater extent of local residence among its stockholders or the greater integration of its ownership with management?

3. Whether, in a competitive proceeding, the Federal Communications Commission is required to grant or deny, and to incorporate in the record its ruling upon, each basic finding, comparative finding, conclusion and exception presented by a party to the proceeding and, in any event, to make comparative findings upon each material point of

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* A Joint Appendix, printed in one volume, was filed in the Court below on behalf of all parties. The record citations in this petition are to that Appendix. A certified copy of the complete typewritten transcript of record has been filed with the Clerk of this Court.

difference between the competing applicants as established by the basic findings?

4. Whether, in a competitive proceeding, the Federal Communications Commission, if not required to make comparative findings, performs its statutory duty under the Communications Act and under the Administrative Procedure Act by making general conclusions (a) which do not show comparative consideration of all of the material points of difference between the applicants as established by its basic findings or the evidence, and (b) which do not show how its general conclusions can be rationally inferred from its basic findings or, to the extent that it considers any points of difference, by weighing each point of difference in favor of one applicant *separately* against the *collective* weight of all points of difference found or concluded in favor of the competing applicant?

5. Whether the quantum and quality of evidence required to sustain a finding by the Federal Communications Commission is governed by sections 7(c) and 10(e) of the Administrative Procedure Act and, if so, what is the proper construction of those sections?

D. STATUTES INVOLVED.

The statutes involved are the Communications Act of 1934, as amended, and the Administrative Procedure Act. The pertinent provisions of these statutes are printed in the Appendix, pp. 23-6, *infra.*

E. SUMMARY STATEMENT OF MATTERS RAISING THE QUESTIONS PRESENTED.

1. Proceedings Before the Commission.

A consolidated hearing upon the mutually exclusive applications of Petitioner and CBI was had before an Examiner on January 14-16, 1946. On March 7, 1947, the Commission rendered a final decision in which it granted

CBI's application and denied Petitioner's application. (R. 336.) On March 26, 1947, a petition for rehearing was filed by Petitioner. In an order dated September 5, 1947, the Commission set aside its decision of March 7, 1947 and ordered a further consolidated hearing which was had on October 22-24, 27-29, 1947 at which both parties presented substantially new cases and entirely new program proposals and new operating policies. (R. 336.)

Proposed basic findings, comparative findings and conclusions were filed by Petitioner and CBI. (R. 313-23, 336). A proposed decision looking to a denial of Petitioner's application and a grant of CBI's application was entered July 14 and released July 16, 1948. (R. 224-73.) Petitioner filed exceptions to the proposed decision. (R. 273-331.) By a final decision entered on January 27 and released on January 28, 1949 the Commission (three Commissioners not participating) denied Petitioner's application and granted CBI's application. (R. 336-87.) On February 17, 1949 Petitioner filed a petition for rehearing which was denied by an order entered on February 23, and released on February 27, 1950. (R. 391, 402.) Notice of appeal to the Circuit Court of Appeals for the District of Columbia was filed on March 18, 1950. (R. 1.) On May 10, 1951 that Court entered a judgment affirming the order of the Commission. (R. 410.)

(a) *The material points of difference between the proposals of Petitioner and CBI.*

In order to show the questions of law presented by the decisions of the Commission and the court below, the material points of difference between the proposals of Petitioner and CBI as established by the basic findings and evidence are summarized below:

Point (1): Efficient Use of Frequency. Petitioner will provide broadcasting service over more hours per week, primary daytime service over a larger area and to 111,000

more persons and better nighttime service in, and over a larger portion of, the important Cleveland industrial district. (R. 343, 365, 378-9.)

Point (2): Broadcasting Experience. Petitioner, all of its directors and most of its officers have had very extensive experience, whereas only one person connected with CBI has had any experience, in the management or operation of a broadcasting station. (R. 338-41, 385; Fdg. 30, R. 364.)

Point (3): Financial Ability. Petitioner has liquid assets many times exceeding the cost of constructing its proposed station and operating it at a loss over a prolonged development period. (R. 350-1.) CBI's assets, less outstanding and unpaid obligations, are insufficient to meet its estimated construction costs and its estimated costs of operation during an initial three months development period. (R. 143, 177-8, 218-9, 222, 364.) To meet this deficit, CBI relied upon an expired commitment of a bank to make loans aggregating not more than $200,000 on terms and conditions to be mutually agreed upon. (R. 108.)

Point (4): Program Proposals. Petitioner proposed to devote a much larger percentage of its broadcasting time during the basic broadcast day and particularly during the prime listening hours to public service programs. (Fdg. 20, R. 350; Fdg. 50, R. 377.) Petitioner's code of instructions to its station managers requires them actively to promote sustaining broadcasts of all viewpoints on controversial public issues. (R. 344.) CBI's declaration of program policies does not contain this requirement. (R. 365-6, Cl. Ex. 53.)

Petitioner will provide much more extensive news sources, particularly for local news, and a larger station news staff than will CBI. (R. 57, 64-72, 210, 212, 345-6; R. 222, 367.)

Petitioner will spend $2,000.00 per week to develop local live talent. (Fdg. 18, R. 349.) CBI proposes to spend

$200.00 per week for "live talent on per job basis". (R. 222.) Live programs will constitute a much larger proportion of Petitioner's programs. (R. 350, 377.)

Petitioner will devote a larger amount of its broadcasting time, both during the basic broadcasting day and during the prime listening hours, to broadcasts of amateur and professional sports than will CBI. (Fdg. 20, R. 350; Fdg. 50, R. 377.) Petitioner has provided $100,000 for the purchase of rights to broadcast professional and other sports events during the first year of operation. (R. 347.) CBI has made no provision for the purchase of such rights. (R. 221-2, 166-7.)

Point (5): Operating Policies. Petitioner will operate without network affiliation so long as existing need for local operation continues whereas CBI will consider network affiliation whenever it may become available. (R. 343, 365.) Petitioner has adopted a definite operating policy under which it will reserve substantial broadcasting time during all segments of the broadcast day for sustaining public service programs and limit the number of commercial spot announcements. (R. 349-50.) CBI has merely requested its proposed general manager to make recommendations on those subjects for consideration at some unspecified time after its proposed station has been in full time operation. (R. 170-1, 192.)

Point (6): Character. On the rehearing the President of CBI testified, contrary to the facts, with respect to the qualifications of two of CBI's stockholders. (R. 94, 359, 363.) The proposed program director of CBI twice testified falsely that there was no unsatisfied judgment outstanding against him. (R. 164-5, 363.) A stockholder of CBI, who acted as counsel for CBI in eliciting the foregoing testimony, had "heard about the claim" but made no disclosure until interrogated by the Examiner. (R. 185.) In its proposed decision the Commission relied heavily upon the circumstances that a stockholder, director and the

proposed program director of CBI had been a lifelong resident, and had had experience as a Cleveland newspaper reporter and as operator of an advertising business utilizing radio advertising. (R. 248, 251, 269, 271.) Although a routine interim ownership report filed on July 9, 1948 in a different docket pursuant to Commission general rules, disclosed that this person had ceased to be connected with CBI, CBI did not disclose this fact to the Commission in this proceeding and instead relied on the connection of this person with CBI in the foregoing capacities as a ground for overruling Petitioner's exceptions to the proposed decision. (R. 353, fn. 4; R. 362, fn. 8.)

Point (7): Local Residence and Integration of Ownership and Management. Three officers of Petitioner reside in metropolitan Cleveland and one of such locally resident officers will participate in the day to day operation of its proposed AM station as general manager. The controlling stockholder of Petitioner is The E. W. Scripps Company, which has published The Cleveland Press in Cleveland since 1878. Petitioner will bring to, and utilize in, the operation of its station all of the existing and continuously maintained knowledge of local conditions, interests and problems which is possessed by the Press' large staff of specialists who devote their time continuously to the various aspects of community life. (R. 55, 60-1, 65-76, 212-5, 345-6.) Since the proposed program director of CBI has severed his connection with that company, only one of CBI's stockholders, a non-resident, will participate in the day to day operation of its proposed staff. All other stockholders intend to continue their business, professional and/or official activities and duties which have fully occupied their time. (R. 88-9, 100, 103-5, 107-8, 113, 117, 118.)

Point (8): Diversity of Ownership of Media of Mass Communications. Both Petitioner and CBI hold permits to construct FM stations in Cleveland. Petitioner holds, and CBI has applied for, a permit to construct a TV sta-

tion in Cleveland. In metropolitan Cleveland six AM stations are in operation. Construction permits have been issued for a total of 9 FM and 3 TV stations; and in addition to the instant applications, applications are pending for two AM stations, 1 FM station and 5 TV stations. (R. 337-8.) In addition to three English language daily papers, 45 English language weekly newspapers, 33 foreign language newspapers and 45 English language monthly magazines are published in Cleveland. Other media of mass communications in metropolitan Cleveland are very numerous. (R. 338.) The controlling stockholder of Petitioner publishes one of the three English language daily newspapers.

(b) *The Decision of the Commission.*

The Commission refused to make or deny any of the comparative findings of fact requested by Petitioner, or to make any comparative findings, upon the foregoing material points of difference between the applicants. (R. 313-23, 336-87.)

In its conclusions the Commission gave no consideration to, and wholly disregarded, (1) two of the three material respects in which Petitioner proposed a superior use of the frequency (cf. Fdgs. 11, 33, 53, 54, 55, R. 343, 365, 378-80 and Conc. 8, R. 386); (2) the much greater assurance of good use of the frequency afforded by the ample financial resources of Petitioner in comparison with the uncertainty and doubtful sufficiency of CBI's financial resources to construct and operate the proposed facilities over a reasonable development period (cf. Fdgs. 21, 32, R. 350-1, 364-5, and Conc. 9, R. 386); (3) the important differences in program proposals with respect to the study of, and arrangements for, types and sources of programs suitable to meet local needs, amounts of time to be devoted to sustaining public service programs, policies with respect to actively promoting sustaining broadcasts on controversial public issues, amount and quality of news sources and newscasts, provision for live programs as distinguished from playing rec-

ords, financial provision for developing local live talent and provisions for broadcast of and purchase of rights for broadcasting, professional and amateur sports (cf. Fdgs. 11-18, 20, 21, 33-37, 50, R. 343-51, 365-69, 377, and Conc. 6, R. 384-5); (4) the Petitioner's definite operating policies with respect to reservation of sustaining time for public service programs and limitation of commercial spot announcements (cf. Fdgs. 19, 38, R. 349-50, 369-70, and Conc. 6, R. 384-5); (5) the risk to the public interest and the listening public inherent in the defects of character displayed by CBI in the four instances of concealment, misrepresentation and lack of candor displayed by CBI in presenting and prosecuting its application (cf. pp. 6-7, *supra,* and Conclusions, R. 385-7).

The Commission first concluded that the greater extent of local residence among stockholders and officers of CBI, the allegedly greater degree of integration of ownership and management in the case of CBI[1] and the promotion of greater diversification of the media of mass communications in the Cleveland area favored CBI although it did not conclude, and neither its basic findings or the evidence would support an inference, that for these reasons CBI would provide a better, a more comprehensive, or more assured broadcasting service than it proposed to provide. (Concls. 2-5, R. 380-4.) Having reached the foregoing conclusions, the Commission then purported to weigh each point of Petitioner's superiority which it elected to consider at all, *separately* against the assumed *collective* weight of the three foregoing factors and thereupon to conclude: That

[1] With respect to this factor, the Commission concluded that CBI should be preferred because CBI's stockholders had "far greater knowledge of and association with Cleveland and its various civic enterprises". (R. 382-3.) In so concluding the Commission disregarded the facts that no stockholder of CBI would participate in the day-to-day operation of the station and that Petitioner will bring to, and utilize in, the operation of its station an immensely greater knowledge of local conditions, problems and interests, constantly maintained, than CBI could or would do. Point (7), p. 7, *supra.*

the superiority of Petitioner's program proposals does not "outweigh the factors outlined above" (Conc. 6, R. 385); that the greatly superior radio experience of Petitioner "is outweighed by other factors discussed herein" (Conc. 7, R. 385); and that Petitioner's more efficient use of the frequency "is outweighed by other considerations, discussed herein". (Conc. 8, R. 386.)

2. The Decision of the Court of Appeals for the District of Columbia Circuit.

The case was argued before and decided by a panel of three judges, viz., Judges Wilbur K. Miller, Fahy and Washington. (R. 404-9.) In substance the Court held that the Commission was not required to make comparative findings on each material point of difference between Petitioner and CBI, to grant or deny or to incorporate in the record its ruling upon each or any of the basic findings, comparative findings, conclusions and exceptions presented by Petitioner, or to give comparative consideration to the relative financial ability or relative character of Petitioner and CBI; that the Commission, having made basic findings with respect to the points of difference between the proposals of the Petitioner and CBI, acted within its statutory authority and discretion by merely making general conclusions which do not show consideration of all or most of the material points of difference in program plans and proposals, consideration of any of the points of difference in operating policies or consideration of two of the three points of difference in efficient use of the frequency; and that the Commission acted within its statutory authority and discretion in discriminating against Petitioner because of its association with an existing medium of mass communications, in preferring CBI on the grounds of the greater extent of local residence of its stockholders, the assumed greater degree of integration of its ownership in the management of its proposed station and its dis-associa-

tion "from existing media of mass communications", in weighing each point of difference in favor of Petitioner which the Commission elected to consider at all, separately against the assumed collective weight of the three foregoing factors and in awarding the permit to CBI on those grounds notwithstanding the fact that such an award denies to the listening public in the Cleveland community the better, more comprehensive and more assured radio broadcasting service. (R. 404-9.)

F. SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that the Federal Communications Commission does not exceed its statutory authority or statutory discretion by denying a construction permit or license to a qualified applicant because such applicant is owned or controlled by interests which own or control a newspaper.

2. In holding that, in a competitive proceeding, the Federal Communications Commission does not exceed its statutory authority or statutory discretion by denying a construction permit or license to a qualified applicant because such applicant is owned or controlled by interests which own or control a newspaper, where the result of such denial is to deprive the listening public of a better, more comprehensive and more assured broadcasting service.

3. In holding that the Commission, in a competitive proceeding, does not exceed its statutory authority or statutory discretion in preferring an applicant upon mere proof of a greater extent of local residence among its stockholders, a greater degree of integration of ownership with management and/or the promotion of diversity of ownership of media of mass communications in a community where the media of mass communications are extremely numerous, their ownership highly diverse, and no element of monopoly or absence of active competition exists in the field of mass communications.

4. In holding that under Section 8(b) of the Administrative Procedure Act (5 U.S.C. 1007(b)) the Commission, in a competitive proceeding, is not required to grant or deny, and to incorporate in the record its ruling upon, each basic finding, comparative finding, conclusion and exception presented by a party to the proceeding.

5. In holding that, in a competitive proceeding, neither the Communications Act of 1934 as amended nor the Administrative Procedure Act requires the Commission to make comparative findings upon the material points of difference between the competing applicants as established by the Commission's basic findings.

6. In holding that, in a competitive proceeding, the Communications Act of 1934 as amended (47 U.S.C. §§ 309(a) and 319(a)) does not require the Commission to give comparative consideration (a) to the relative financial ability or (b) to the relative character of the competing applicants.

7. In holding that, in a competitive proceeding, so long as the Commission makes separate and uncorrelated basic findings for each applicant upon each point with respect to which the evidence establishes a difference between them, the Commission, without making comparative findings upon such points of difference, performs its statutory duty, and acts within its statutory authority and discretion, under the Communications Act of 1934, as amended and under the Administrative Procedure Act by making general conclusions (a) which do not show comparative consideration of all of the material points of difference between the applicants as shown by the Commission's basic findings or the evidence and (b) which do not show how the Commission's general conclusions can be rationally inferred from its basic findings.

8. In holding that, under the Communications Act of 1934 as amended and under the Administrative Procedure Act, the Commission, in a competitive proceeding, has statutory

authority and discretion to dispose piecemeal of each point of difference which favors one applicant by weighing such point *separately* against the *collective* weight of all points of difference found or concluded to favor another applicant.

9. In its determination of the respective spheres of the Federal Communications Commission and of the Courts under Section 402(e) of the Communications Act (47 U.S.C. 402(e)) and under Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009(e)).

10. In failing to set aside the Commission's findings Nos. 29 (R. 363-4) and 51 (R. 377-8) notwithstanding the requirements of Sections 7(c) and 10(e) of the Administrative Procedure Act (5 U.S.C. 1006(c), 1009(e)) and of Section 402 (e) of the Communications Act (47 U.S.C. 402(e)) with respect to the quality and quantum of evidence necessary to sustain a finding.

G. THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. Whether the Federal Communications Commission has Authority or Discretion to Disqualify, Fully or Pro Tanto, an Applicant for a Construction Permit or a License Because of Newspaper Affiliation.

The present case presents the questions whether the Federal Communications Commission, in a competitive proceeding, has statutory authority or statutory discretion under the Communications Act to deny a construction permit or a license to an applicant otherwise qualified, because such applicant is affiliated with interests which publish a newspaper—even where the result is to deprive the listening public of the better, more comprehensive and more assured broadcasting service. In affirming the decision of the Commission, the court below has answered those questions in the affirmative.

It is clear that Petitioner's affiliation with a newspaper was not only an important reason but in fact the Commission's basic and controlling reason for denying Petitioner's application. The Commission's purported reliance upon local residence and alleged integration of ownership with management is not only a mere makeweight but without substantial basis in the evidence. The Commission itself has aptly characterized these alleged factors as mere theoretical presumptions. *Re Hearst Radio, Inc., et al.* 6 Pike and Fischer Radio Regulation 994, 1027, 1030 (1951). In any event, since the assumptions which underlie these theoretical presumptions are negatived in the instant record, the denial of Petitioner's application must rest upon its newspaper affiliation.[2]

Admissions of the Commission that newspaper affiliates are not disqualified by the Communications Act and that the Commission has no authority to deny their applications upon that ground, cannot obscure the fact that the Commission has enunciated, adopted and applied an administrative practice or policy under which newspaper affiliates are in fact disqualified by the Commission in every competitive proceeding. This administrative practice or policy has been publicly announced in the Federal Regis-

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[2] The foregoing theoretical presumptions rest upon an assumption that mere proof of local residence *per se* establishes a greater knowledge of local conditions and upon a further assumption that, *if locally resident owners participate in the day-to-day operation of a station,* their broadcasting proposals are more likely to be carried out. Apart from the highly speculative character of these presumptions and underlying assumptions, these factors can never support an inference or conjecture that an applicant will provide a better, more comprehensive or more assured broadcasting service than he himself proposes to provide, or overcome proof that another competing applicant with a lesser extent of local residence among its officers and stockholders, will in fact bring to and utilize in the day-to-day operation of the station a much greater knowledge of local conditions, continuously renewed and maintained, than will the applicant with a greater extent of local residence.

ter[3] and has been applied by the Commission in its decisions.[4]

To implement this administrative practice the Commission, in every competitive proceeding where, *but only where*, one of the applicants is a newspaper affiliate, designates for hearing (as it did in this case) an additional issue viz.,

> "the extent to which, if any, either of the applicants is associated with other media of mass communication in the area to be served." (R. 29)

If the Commission's preconceived view that newspaper affiliation is a ground for disqualification because the licensing of such an applicant "tends to concentrate the control of the media of mass communication", is an authorized standard, no hearing is required to establish that one applicant is associated with a newspaper since that fact will be disclosed in the application. Manifestly the purported holding of a hearing upon such an issue is a mere sham and pretense. It is as much a denial of a fair hearing as was the administrative practice which was condemned by this Court in *Ashbacker Radio Corporation* v. *F. C. C.*, 326 U. S. 327 (1945).

Although the Commission in administering the Communications Act may consider relevant public policies expressed in other federal statutes, such as the anti-trust laws, it cannot make those statutes or its interpretation

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[3] Public Notice, 9 Fed. Reg. 702 (1944).

[4] *Re Southern Tier Radio Service*, 3 R. R. 211 (1946); *Re The Observer Radio Co.*, 3 R. R. 234 (1946); *Re The Voice of Augusta*, 3 R. R. 436 (1946); *Re Arkansas-Oklahoma Broadcasting Corp.*, 3 R. R. 479 (1946); *Re Nashville Radio Corp.*, 3 R. R. 515 (1946); *Re Meadville Tribune Broadcasting Co.*, 3 R. R. 544 (1946); *Re Sebring*, 3 R. R. 710 (1947); *Re Green Bay Broadcasting Co.*, 3 R. R. 748 (1947); *Re Commonwealth Broadcasting Corp.*, 3 R. R. 998 (1947); *Re Central Broadcasting Co.*, 3 R. R. 1151 (1947); *Re Sandusky Broadcasting Co.*, 3 R. R. 1265 (1947); *Re Noe.*, 3 R. R. 1821 (1948); *Re WBNX Broadcasting Co., Inc.*, 4 R. R. 205 (1948); *Re Cobb*, 3 R. R. 540 (1946).

of the public policy expressed in them, the foundation for the exercise of authority denied or not granted by the Communications Act. Much less where, as here, there is no showing of monopoly or of an absence of wide and active competition in the field of mass communications, can the Commission lawfully make its views of the supposed policy of the anti-trust laws the basis of denying to the listening public the better broadcasting service.

(a) Importance of the Question.

It would be difficult to overstate the importance of this question. As of January 1, 1951, 382 standard radio broadcasting stations and 230 frequency modulation broadcasting stations were owned or controlled by, or were affiliated with, newspaper publishers.[5] Under Section 307(d) of the Communications Act, the renewal of a license (required every 3 years) "shall be limited to and governed by the same considerations and practice which affect the granting of original applications". As to the application of the foregoing administrative practice in proceedings for renewal of license see Chairman Coy's dissenting opinion in *Re Hearst Radio, Inc., supra.*

As of August 1, 1951, 45 of the 107 existing television broadcasting stations were owned or controlled by, or were affiliated with, newspaper publishers. As of August 1, 1951, not less than 90 applicants publishing or affiliated with publishers of newspapers, had filed applications for permits to construct new television broadcasting stations in 85 different market areas.[6]

Whether under the present Federal Communications Act, the Communications Commission may discriminate against applicants for permits to construct broadcasting or television stations who publish, or are affiliated with, publishers of newspapers, is a question not only of momentous

[5] Broadcasting Yearbook (1951).

[6] Television Digest (1951).

importance but also one which affects the entire country. Whether the extent to which the newspaper industry may participate in the broadcasting and television industries is to be determined by the Commission or by the Congress is a question which goes to the root of our democratic processes.

(b) Conflicting Decisions in the United States Court of Appeals for the District of Columbia Circuit.

The decisions in the instant case and in *Plains Radio Broadcasting Company* v. *F. C. C.*, 85 U. S. App. D. C. 48, 52, 175 F. (2d) 359, 363 (1949), are in conflict with the decisions in *Tri-State Broadcasting Company* v. *F. C. C.*, 68 App. D. C. 292, 294, 96 F. (2d) 564 (1938), and *Stahlman* v. *F. C. C.*, 75 U. S. App. D. C. 176, 178, 126 F. (2d) 124 (1942). In the *Stahlman* case Judge Groner said:

> "It (the public interest) does not embrace and should not be extended by implication to embrace a ban on newspapers as such, for in that case it would follow that the power to exclude exists also as to schools and churches; and if to these, the interdict might be applied wherever the Commission chose to apply it. This, we think, would be in total contravention of that equality of right and opportunity which Congress has meticulously written into the Act, and likewise in contravention of that vital principle that whatever fetters a free press fetters ourselves. In this view, we need not consider whether the power exists even in Congress, for Congress has not undertaken, and probably never will undertake, to delegate such power to the Commission. Hence it is that in the present state of the law a newspaper owner who is also the owner of a broadcast station may very well say to whoever challenges this dual right: 'Who are thou that judgeth another man's servant. To his own master he standeth or falleth'."

While the conflct in the decisions of a single court of appeals is not ordinarily, in and of itself, a ground for certiorari, this Court has regarded conflicts in decisions among the various panels of the Court of Appeals for the

Second Circuit in cases dealing with immigration and with bankruptcy frauds, as an appropriate occasion for exercising review because of the large number of such cases in that circuit. Even more clearly, conflicts among decisions of different panels of the Court of Appeals for the District of Columbia Circuit with respect to a field in which that court exclusively exercises the obligation of judicial review, should be regarded as an adequate ground for certiorari.

As further evidence of the uncertain status of the law on the newspaper issue, the following may be noted:

1. In 1937, the general counsel of the Commission in a memorandum opinion advised the Commission that it did not have authority to exclude newspapers from ownership of stations.[7]

2. Remedial legislation has been introduced in Congress which would prevent the Commission from adopting any rule, regulation or policy which would expressly deny radio broadcasting licenses to newspapers. Although the Commission at the various hearings on such remedial legislation has assured Congress that it did not and would not discriminate against newspaper applicants and thereby induced Congress to refrain from acting on such legislation, neverthe-

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[7] Opinion of F. C. C. General Counsel Hampson Gary, February 13, 1937: "In my opinion, therefore, the Commission does not have the authority, under the existing law and in the absence of an expression of public policy on the subject by the Congress, to deny an application to a newspaper owner for radio facilities solely upon the ground that the granting of such an application would be against public policy. It is clear, however, that the Commission has the duty of examining the facts in each particular case to determine whether the granting of an application will serve 'public interest, convenience or necessity.' One fact among others to be considered by the Commission is the business connections of the applicant, newspaper or other, and in my opinion the Commission has the power to refuse a license to a newspaper owner if upon all the facts before it in a given case the Commission is unable to find that the granting of such application would serve public interest, convenience or necessity."

less its administrative practice and decisions are squarely in conflict with such assurances.[8]

2. Important Questions of Substance and Procedure Under the Communications Act and Under the Administrative Procedure Act.

This case presents highly important questions of substance and procedure under the Administrative Procedure Act. It also presents highly important questions of pro-

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[8] E. g. Section 418 of S. 1333, 80th Cong. 1st Sess. (1947): "The Commission shall make or promulgate no order, rule, or regulation of substance or procedure, the purpose or effect of which will or may be to effect a discrimination between persons based upon race, or religious or political affiliation, or kind of lawful occupation, or business association, and no rights, privileges, benefits, or licenses authorized by law shall be denied or withheld in whole or in part where adequate right or entitlement thereto is shown." Senator White in his introductory statement on this bill stated that this amendment was specifically directed against the anti-newspaper policy of the Commission. When the Senate Interstate Commerce Committee reported out this bill, S. Rep't No. 1567, 80th Cong., 2d Sess. (1948), section 418 had been renumbered section 332. To quote from the Committee Report: "The second sentence of this section is intended to remove from the Commission any authority to make any rule or regulation which would permit it, in granting licenses, to discriminate between persons based on race, religion, political affiliation, or kind of lawful business in which they may be engaged. Specifically, this is intended, in part, to clarify the long-disputed question of whether newspapers may engage in radio broadcasting. The Commission's authority to grant applications on the basis of what best serves the public interest, convenience or necessity is not impaired, however, in any way." No final Congressional action was taken on this bill and it died with the expiration of Congress. In 1949 Senator McFarland introduced S. 1973, 81st Cong. 1st Sess. which contained the same provision against discrimination. At the hearings on this bill before the Senate Interstate Commerce Committee, the Commission did not object to this provision. They expressed constitutional doubts as to whether they could adopt a *rule* which would enable it to discriminate against newspaper applicants. Hearings on S. 1973, 81st Cong. 1st Sess. (1949) at pp. 20, 42-44. When the Committee reported out the McFarland Bill, it deleted the so-called non-discrimination section on the assurances of the Commission that it did not and would not discriminate against newspapers. See S. Rep't. 741, 81st Cong. 1st Sess. (1949).

cedure and of the nature and extent of the duties and obligations imposed, not only upon the Federal Communications Commission, but also upon all federal administrative agencies by the Administrative Procedure Act. (See "Questions Presented," pp. 2-3, *supra,* and "Specification of Errors to be Urged," pp. 11-13, *supra.*)

If these questions involved only proceedings before the Federal Communications Commission, their great and widespread public importance would be patent and would require their review and settlement by this Court. *FCC* v. *Sanders Brothers,* 309 U. S. 470 (1940); *FCC* v. *NBC,* 319 U. S. 239 (1943).

However, the questions with regard to the construction of the Administrative Procedure Act govern administrative actions by the multitude of federal agencies, which day-to-day, in constantly increasing numbers and in new and expanding fields, finally determine the rights of the public and of citizens except in the relatively negligible number of cases where the citizen can afford to invoke judicial review. In enacting the Administrative Procedure Act, the Congress declared that it was attempting "to provide a form and scope of protection long overdue", that it would be the duty of the courts to prevent avoidance of the requirements of the Act "by any manner or form of indirection", and that judicial review, although had in only a relatively few cases, is not only important but "indispensable" to prevent "the arbitrary exercise of power, or the assumption of powers not granted". *Sen. Doc.* 248, 79th Congress, 2d Sess., 326 (1946).

Illustratively, the quantity and quantum of persuasion required to sustain an administrative finding under Sections 7(c) and 10(e) of the Administrative Procedure Act and whether an agency must grant or refuse and incorporate in the record its ruling upon each request, finding, conclusion and specification, are matters of great importance in the daily administration of statutes by the administrative agencies of the government. The importance

which Congress attached to these requirements and the clear meaning of the statutory language, are alike confirmed by the Committee Reports. E.g., see *Sen. Doc.* 248, *supra*, 365, 367, 370.

The holding of the court below that the Federal Communication Commission need not make comparative findings upon each point of difference between competing applicants, may ignore some differences and may dispose of others piecemeal, conflicts with its decision in *Johnston Broadcasting Company* v. *F.C.C.*, 175 F. (2d) 351, 357 (1949). In the *Johnston* case the court, after stating the essentials of the Commission action in a comparative case, said:

> "The first four of these essentials are established requisites of Commission decisions. The progress to a valid conclusion, as long-since established by the cases, is: to receive the evidence; then to make from the evidence findings of basic facts; *then to make, by inference from the basic facts, findings of the ultimate facts which are requisite to decision; then to draw a final conclusion* by the application of the statutory criterion to the ultimate facts. The last two essentials above stated—(5) and (6)—are made necessary by the peculiar characteristics of a comparative determination. The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. Neither can it base its conclusion upon a selection from among its findings of differences and ignore all other findings." (Italics ours)

3. Important Questions as to Respective Spheres of Administrative Agencies and the Courts Under the Communiciations Act of 1934 and the Administrative Procedure Act.

The case presents extremely important questions in regard to the respective spheres of the Federal Communications Commission and of the courts under Section 402(e) of the Communications Act and under Section 10(e) of the

Administrative Procedure Act. See "Questions Presented," pp. 2-3, *supra,* and "Specifications of Errors Urged," pp. 11-13, *supra.* The Court below erred, we believe, in determining the respective spheres of the courts and of the Federal Communications Commission and in determining the respective spheres of the courts and of all federal agencies under Section 10(e) of the Administrative Procedure Act. In any event, such questions are of vital importance and of national application, which have not been but should be decided by this Court. *F. C. C.* v. *Nelson Bros. Bond & Mtg. Co.,* 289 U. S. 266 (1933); *F. C. C.* v. *Pottsville Broadcasting Co.,* 309 U. S. 134 (1940); *F. C. C.* v. *Columbia Broadcasting System,* 311 U. S. 132 (1940).

H. CONCLUSION.

Wherefore your Petitioner prays that writ of certiorari be granted under the seal of this Court directed to the United States Court of Appeals for the District of Columbia Circuit, and for such further relief as to this Court may seem proper and just.

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Dated August 7, 1951.

APPENDIX.

Communications Act of 1934 (47 U. S. C. § 151 et seq.):

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

SEC. 308. (b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The

Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

SEC. 402. (e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

Administrative Procedure Act (5 U.S.C. § 1001 et seq.):

SEC. 7. (c) (5 USC 1006(c)) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, imma-

terial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

SEC. 8. (b) (5 USC 1007(b) *Submittals and Decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SEC. 10 (e) (5 USC 1009) (e)) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse or discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in

excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure acquired by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
Argument	7
Conclusion	16
Appendix	17

CITATIONS

Cases:

Associated Press v. *United States*, 326 U. S. 1	12
Hanford Pub. Co., 11 F.C.C. 1431	8
Johnston Broadcasting Company v. *Federal Communications Commission*, 175 F. 2d 351	13
Orlando Daily Newspapers, Inc., 11 F.C.C. 760	8, 9
Plains Radio Broadcasting Co. v. *Federal Communications Commission*, 175 F. 2d 359	10
Sandusky Broadcasting Co., 11 F.C.C. 1383	9
Stahlman v. *Federal Communications Commission*, 126 F. 2d 124	10
Town Talk Broadcasting Co., 3 Pike & Fischer R.R. 769	8
Tri-State Broadcasting Company v. *Federal Communications Commission*, 96 F. 2d 564	10-11

Statutes:

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*:	
Section 8(b)	13-14, 17

Miscellaneous:

H. Rep. No. 1980, 79th Cong., 2d Sess.	14
Public Notice, "Newspaper Ownership of Radio Stations," January 13, 1944, 9 F.R. 702	8
Senate Document No. 248, 79th Cong., 2d Sess.	14

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 228

SCRIPPS-HOWARD RADIO, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The decision of the Federal Communications Commission[1] (R. 336-387) [2] has not been reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 404-409) is reported at 189 F. 2d 677.

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[1] The Commission's decision embraces its findings of fact, conclusions of law, and order.

[2] In this brief references to the printed record appear as R. —, and references to the original administrative record appear as Tr. —.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the decision of the Federal Communications Commission, was entered on May 10, 1951 (R. 410). The petition for a writ of certiorari was filed on August 7, 1951. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1) and 47 U.S.C. 402(e).

QUESTION PRESENTED

Petitioner Scripps-Howard is an unsuccessful applicant for a permit to construct a new standard AM broadcast station in Cleveland, Ohio. Its application was heard by the Federal Communications Commission, together with a mutually exclusive, competing application filed by Cleveland Broadcasting Incorporated. The permit was granted to Cleveland Broadcasting. The following question is presented:

Whether, in the comparative hearing before it, the Commission complied with relevant procedural requirements, properly made findings of fact and conclusions as to all relevant and significant points of difference in the respective qualifications of the applicants, and properly evaluated those findings and conclusions in reaching its decision that a grant of Cleveland Broadcasting's application would better serve the public interest than a grant to petitioner.

STATUTES INVOLVED

Pertinent sections of the Communications Act of 1934 and the Administrative Procedure Act have been set out in the Petition and Appendix attached thereto. Section 8(b) of the Administrative Procedure Act is reprinted in the Appendix, *infra,* p. 17.

STATEMENT

On October 8, 1945, Scripps-Howard applied to the Commission for a permit to construct a new standard AM broadcast station in Cleveland, Ohio (Tr. 245). Previously, on September 24, 1945, Cleveland Broadcasting had filed a mutually exclusive application for the same facilities [3] in the same city (Tr. 2). On December 17, 1945, the Commission designated the two applications for a consolidated hearing (R. 24-27).[4]

A hearing on the applications was held in Washington, D. C., on January 14-16, 1946. On September 4, 1946, the Commission adopted a Proposed Decision looking to a grant of Cleveland Broadcasting's application and denial of Scripps-Howard's (Tr. 2498-2505). Exceptions to the Proposed Decision and a request for oral argument were filed by Scripps-Howard on September 30, 1946 (Tr. 2506-2537). Oral argument was held on these exceptions on November 27, 1946 (Tr. 2576-2623).

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[3] Thirteen hundred kilocycles, with a power of 5 kilowatts, unlimited time, employing a directional antenna.

[4] Three other applications were consolidated in this hearing, but were removed from the hearing docket for reasons not material here (Tr. 394).

On the same date, petitioner filed a petition to remand which requested, in the event that the Commission was unable to conclude from the existing record that Scripps-Howard should be preferred, that the case be referred to the Examiner to take further evidence. Its petition alleged that the proposed decision was predicated on two factors—(1) local residence and familiarity with local conditions, and (2) diversification of control over the media of mass communications in the Cleveland area; that these subjects had not been properly raised by the hearing issues; and that petitioner was accordingly prejudiced in the presentation of its case (Tr. 2624-2630). On February 5, 1947 the Commission adopted a final decision granting Cleveland Broadcasting's application and denying both the Scripps-Howard application and its petition to remand (Tr. 2648-2657). Scripps-Howard thereupon filed a petition for rehearing which, in part, repeated the contentions made in its petition to remand (Tr. 2658). This was opposed by Cleveland Broadcasting, but on September 5, 1947, the Commission set aside its decision and reopened the record for the taking of further testimony as to

> (a) The qualifications of the applicant corporations, their officers, directors and stockholders to construct and operate a radio station with respect to their length of residence, their knowledge of and familiarity with the community to be served; the extent of the integration of the ownership of the applicants and the

management of the proposed radio stations; and the extent to which, if any, either of the applicants is associated with other media of mass commniucation in the area to be served.

(b) The type and character of the program services proposed to be rendered and whether it would meet the requirements of the areas and populations proposed to be served. [R. 28-29.]

A further hearing was held on October 22-24, 27-29, 1947, and on December 22, 1947, both applicants filed Proposed Findings and Conclusions (Tr. 2718-2907). On July 14, 1948, the Commission adopted a Proposed Decision looking to a grant of the Cleveland Broadcasting application (R. 224-273). Scripps-Howard filed exceptions to this Proposed Decision and requested oral argument (R. 273-331). Oral argument was held on November 26, 1948 (Tr. 3115). On January 27, 1949, the Commission adopted a final decision granting the Cleveland Boadcasting application and denying the Scripps-Howard application (R. 336-387). Scripps-Howard's petition for a second rehearing (Tr. 3224-3257) and its motion to stay the issuance of a construction permit or any other form of authorization to Cleveland Broadcasting (Tr. 3258) were denied (R. 390-402; Tr. 3269-3270).

In its decision, the Commission found that each applicant met the basic qualifications for licensees, including the financial capacity to carry out its

proposals (R. 386).[5] Six comparative points of difference over and above the minimum qualifications had been urged by one or the other of the parties. These were (1) program plans and policies, (2) efficient use of the frequency, (3) broadcasting experience, (4) local residence, (5) integration of ownership and management, and (6) diversification of control of the media of mass communications. The Commission evaluated the proposed program schedules and announced operating policies of the applicants to determine whether each proposed a meritorious, well-rounded program service designed to meet the needs and conditions of the area to be served. It concluded that the program plans of the two applicants were similar in nature, that both were meritorious, and that neither applicant had demonstrated superiority in this respect over the other (R. 384-5). The Commission concluded that while Scripps-Howard had greater broadcasting experience (R. 385-6) and proposed a somewhat more efficient use of the frequency (R. 386), Cleveland Broadcasting gave more assurance of operating the proposed local, non-network station in a manner best calculated to serve the public interest because of its marked superiority with respect to local residence and knowledge of the area (R. 380-383), its greater integration of ownership and management (R.

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[5] The Commission also concluded that no finding adverse to Cleveland Broadcasting was warranted with respect to its candor and trustworthiness (R. 363-4).

383-4), and its freedom from affiliation with other media of mass communications in Cleveland (R. 384).

In affirming the decision, the court of appeals held that the Commission had made full and adequate basic and comparative findings of fact. Speaking for the court, Judge Fahy stated (R. 406):

> * * * the reason for the final conclusion in favor of the Cleveland Company is clearly stated; this conclusion is a rational one from the basic findings; the latter are quite sufficient in number and substance to support the conclusion; the ultimate facts are rational inferences from the basic factual findings; and the latter find substantial support in the evidence under the rule as recently stated by the Supreme Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951). The final conclusion is shown clearly enough to have been reached upon a composite consideration of the findings indicating the differences.

ARGUMENT

This case involves a decision of the Commission, made after full hearings, concerning the comparative qualifications of two competing applicants for a permit to construct a radio station. The legal criteria governing the disposition of such applications are well-established. The factual basis for the instant decision has been carefully reviewed by the court of appeals, and the evidence and the findings have been found fully adequate to support the

result. The case presents no novel or substantial question which would warrant the consideration of this Court.

1. Petitioner's principal contention is that the Commission disqualified it because of its newspaper affiliation, and that the court has, in effect, sustained the Commission's authority to act on that basis. The premise is completely baseless. Neither in this case, nor in any other, has the Commission disqualified an applicant because it was owned by or affiliated with a newspaper.[6]

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[6] In 1944, after conducting an extensive hearing concerning the question of newspaper ownership of radio stations, the Commission issued a Public Notice (January 13, 1944, 9 F.R. 702) in which it stated that it had decided not to adopt any general rule with respect to newspaper ownership and that it did "not feel that it should deny a license merely because the applicant is engaged or interested in a particular type of business." The notice further states: "All the Commissioners agree to the general principle that diversification of control of [communications] media is desirable. The Commission does not desire to discourage legally qualified persons from applying for licenses, but does desire to encourage the maximum number of qualified persons to enter the field of mass communications, and to permit them to use all modern inventions and improvements in the art to insure good public service."

Petitioner's statement (Pet. 14) that "the Commission has enunciated, adopted and applied an administrative practice or policy under which newspaper affiliates are in fact disqualified by the Commission in every competitive proceeding" is not only contradicted by the figures given by petitioner with respect to the incidence of newspaper ownership of radio and television stations (*id.*, p. 16), but is made in the face of Commission decisions in particular cases selecting newspaper applicants over other competing applicants. See, *e.g.*, *Hanford Pub. Co.*, 11 F.C.C. 1431 (1947); *Town Talk Broadcasting Co.*, 3 Pike & Fischer, R.R. 769; *Orlando Daily Newspapers, Inc.*, 11 F.C.C. 760 (1946).

The Commission's consistent policy has been that, in choosing between qualified applicants, it prefers those without newspaper connections because of the public interest in diversification of control over the various media through which news and information are disseminated. The Commission has invariably emphasized, however, that this policy is but one of numerous relevant factors to be weighed and considered in determining whether the grant of a particular application is in the public interest. See, *e.g., Sandusky Broadcasting Co.*, 11 F.C.C. 1383 (1947); *Orlando Daily Newspapers, Inc.*, 11 F.C.C. 760 (1946). It is perfectly plain from the Commission's decision in this proceeding that the factor of newspaper affiliation was considered and weighed as one element of several, each of which was relevant to the final determination. It was precisely because the Commission made fully supported findings as to each relevant factor and because "its final conclusion" rests "upon a composite consideration of the[se] findings * * *" that the court of appeals affirmed (R. 406).[7]

[7] The Commission's reliance on Cleveland Broadcasting's greater integration of ownership and management, and the greater degree of local residence and familiarity with local matters on the part of its stockholders, officers and directors, as additional factors, was not a matter of theoretical presumption. The Commission's decision contains detailed findings with respect to the degree of integration of ownership and management of both of the applicants (R. 353, 341-2), and the far greater incidence of local residence and actual knowledge of the community on the part of the Cleveland Broadcasting stockholders, officers and directors (R. 241-247, 352-3,

Despite petitioner's claim to the contrary (Pet. 17), the decisions of the Court of Appeals for the District of Columbia Circuit are in complete harmony as to the propriety of considering newspaper ownership or affiliation in licensing procedings. In *Stahlman* v. *Federal Communications Commission,* 126 F. 2d 124, while the court stated that the Commission could not promulgate an inflexible rule barring newspapers as a class from radio station ownership, it explicitly upheld the power of the Commission to consider the effect upon the public interest of affiliations between newspapers and radio stations. In *Plains Radio Broadcasting Co.* v. *Federal Communications Commission,* 175 F. 2d 359, which petitioner concedes is not in conflict with the decision below, the court held that, while the incompleteness of the findings in that case required a reversal, the Commission had properly viewed newspaper ownership as a relevant factor bearing on the comparative qualifications of applicants for mutually exclusive facilities.

Petitioner has not attempted to state in what respect the earlier decision in *Tri-State Broadcasting Company* v. *Federal Communications Commission,* 96 F. 2d 564, is in conflict with these cases. In fact, there is no inconsistency whatever. In *Tri-State* the Commission had before it a single application filed by one Roderick, who proposed to build a new

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355-362, 381) than was possessed by Scripps-Howard (R. 339-342). As the court below stated (R. 408), "The evidence fully supports the basic findings upon which the comparison rests."

radio station in El Paso, Texas. Appellant, the Tri-State Broadcasting Company, which already owned two stations in that city, objected to the grant of a license to Roderick on the grounds that there would not be sufficient revenue for the three stations, and that Roderick's ownership of a newspaper in El Paso would give him an unfair competitive advantage. The Commission made no finding relative to newspaper ownership. The court held that this was not error since "We know of no provision of statute or rule of law, and are cited to none, which forbids broadcasting by the owner of a newspaper."

Tri-State did not involve a comparative proceeding. There was no question as to which of two (or more) applicants would bring greater diversity to the world of communications since there was only one applicant seeking a license. Certainly, the holding that the factor of newspaper ownership need not be considered where there is only one applicant for a license is nowise inconsistent with a holding that it may properly be considered by the Commission in cases where there are two or more qualified, competing applicants for a single available license.

The decisions of the District of Columbia Circuit are thus entirely consistent in sustaining the Commission's policy that it will not disqualify newspaper applicants, but will weigh newspaper ownership or affiliation as a comparative factor in determining which of two or more qualified applicants

will best serve the public interest in the circumstances of a particular case. The decisions are also in full accord with the view expressed by this Court in *Associated Press* v. *United States,* 326 U.S. 1, 20, in which it was stated that the First Amendment rests on the assumption that "the widest possible dissemination of information from diverse and antagonistic sources" is essential to the public welfare. As the court below stated in this connection (R. 408-9):

> While uttered in a different context, this thought is the key to the present question. Inherent in the thought is the realization that news communicated to the public is subject to selection and, through selection, to editing, and that in addition there may be diversity in method, manner and emphasis of presentation. Such variations may arise from numerous causes. In considering the public interest the Commission is well within the law when, in choosing between two applications, it attaches significance to the fact that one, in contrast with the other, is dissociated from existing media of mass communication in the area affected. See *Stahlman* v. *Commission,* 75 U.S. App. D. C. 176, 126 F. 2d 124 (1942), and *Plains Radio Broadcasting Co.* v. *Commission,* 85 U.S. App. D.C. 48, 52, 175 F. 2d 359, 363 (1949). This is not to say a permit should be withheld from an applicant because it is otherwise engaged in the dissemination of news. *Stahlman* v. *Commission, supra.* But where one applicant is free of association with exist-

ing media of communication, and the other is not, the Commission, in the interest of competition and consequent diversity, which as we have seen is a part of the public interest, may let its judgment be influenced favorably toward the applicant whose situation promises to promote diversity.

2. The court below, in a careful review of the Commission's findings and conclusions upon each material point of preference advanced by either of the parties, found that the Commission had made proper findings of fact and reached conclusions rationally based upon these findings.[8] Testing the Commission's decision by the criteria set forth in *Johnston Broadcasting Company* v. *Federal Communications Commission,* 175 F. 2d 351, 357 (C.A. D.C. 1949), the court found (R. 405-406) that "Each of these [requirements] was met." Petitioner's version of the material points of difference between it and Cleveland Broadcasting (Pet. 4-8) constitutes an attempt to reargue before this Court the evidentiary questions fully considered and disposed of below, and raises no substantial question.

With respect to the contention that the Commission violated Section 8(b) of the Administrative

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[8] In addition to such matters of basic qualification as financial ability to construct and operate the proposed station, and reliability and candor, these findings and conclusions dealt with program plans and operating policies, experience, efficient use of the frequency, local residence, integration of ownership and management, and diversification of control of the ownership of the media of mass communications in the Cleveland area.

Procedure Act (60 Stat. 242, 5 U.S.C. 1007(b)) by refusing to grant or deny, and to incorporate in the record its ruling upon, each finding, conclusion and exception presented by petitioner, we submit that petitioner was afforded the full range of protection contemplated by that Section and that there was no prejudicial error. Before the Commission's Proposed Decision was announced, petitioner was afforded an opportunity, of which it took advantage (Tr. 2782-2907), to file Proposed Findings and Conclusions. The Commission's Proposed Decision (R. 224-273) contained specific findings and conclusions, to which petitioner took exception in great detail in reiteration of its proposed findings and conclusions (R. 273-331). Even a casual reading of these exceptions makes it plain that petitioner knew from the record exactly which of its proposals had been accepted and which denied.[9] The Commission's final decision likewise contained detailed and specific findings and conclusions. These were fully adequate to advise petitioner of the disposition of its exceptions.[10] The

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[9] The purpose of the requirement that the record show the ruling on each finding, conclusion, or exception presented, is to "preclude later controversy as to what the agency had done." H. Report No. 1980, 79th Cong., 2d Sess., reprinted in Senate Document No. 248, 79th Cong., 2d Sess., on the Legislative History of the Administrative Procedure Act, pp. 235, 288.

[10] Petitioner also filed a petition for rehearing (Tr. 3224-3257), which the Commission denied by Memorandum Opinion and Order (R. 391-402). The opinion stated (R. 394):

"Petitioner's assignments of error and its arguments have already received extensive consideration in the course of this

court of appeals properly held that "it is clear that if the comparisons made are adequate, failure to make others requested is immaterial. The parties may not control the exact form or content of a decision" (R. 405).

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proceeding and for the reasons stated in the decision were not found to be meritorious. In substance, they were previously advanced by the petitioner in its 'Proposed (Requested) Findings and Conclusions' filed on December 23, 1947, in its Exceptions and Memorandum Brief in support of its Exceptions, filed August 5, 1948, to the Commission's proposed decision or at the oral argument of this proceeding which was held before the Commission on November 26, 1948."

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1951.

APPENDIX

The Administrative Procedure Act, 60 Stat. 237 5 U.S.C. § 1001 *et seq.*, provides in part as follows:

> Sec. 8(b). *Submittals and Decisions.*— Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

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